MICHIGAN SUPREME COURT

Office of Public Information

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FOR IMMEDIATE RELEASE

NO-FAULT, SENTENCING ISSUES LEAD SUPREME COURT'S NOVEMBER ORAL ARGUMENTS SCHEDULE; NEWSPAPER'S FOIA CHALLENGE ALSO ON DOCKET

LANSING, MI, November 2, 2005 – A managed care option offered by insurers to their no-fault policyholders is at issue in a case that the Michigan Supreme Court will hear next week.

In *Michigan Chiropractic Council, et al. v Commissioner of Insurance, et al.*, the managed care option at issue requires the policyholders to seek medical care from members of a PPO network and pay extra for out-of-network care, in exchange for a 40 percent premium discount. Two chiropractic associations contend that the option violates Michigan's no-fault act and is also potentially misleading to policyholders. Although the Commissioner of Insurance found that those claims had no merit, both the trial court and the Michigan Court of Appeals ruled that the managed care option did violate the no-fault statute. The respondents, two insurance companies, have appealed from the Court of Appeals ruling.

Also before the Court is *People v Drohan*, in which the defendant, who was convicted of sexually assaulting a co-worker, contends that the trial judge based the defendant's sentence in part on factual findings which were not made by a jury. The case presents the issue of whether Michigan's criminal sentencing system is invalid under a 2004 U.S. Supreme Court decision, *Blakely v Washington*.

The Court will also hear oral arguments in *Herald Company, Inc. v Eastern Michigan University Board of Regents*. The case involves Booth Newspapers' Freedom of Information Act request for a letter written by James Doyle, then the university's Vice President for Business and Finance, to an EMU regent. Doyle wrote the letter at a time when a project to construct a university residence for then-President Samuel Kirkpatrick was under way; the letter concerned Kirkpatrick's involvement in the project. The trial court held that the letter was exempt from FOIA, stating in part that that the public interest in encouraging "frank communications" among public officials and employees outweighed the public interest in disclosing the letter. A divided Court of Appeals panel upheld that ruling.

The remaining 12 cases involve issues of arbitration, contract, civil rights, governmental immunity, tax, divorce, employment, procedure, and criminal law.

Court will be held on **November 8, 9, and 10.** Court will convene at **9:30 a.m.** each day. The Court will hear oral arguments in its courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

(*Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at* http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. *For further details about the cases, please contact the attorneys.*)

Tuesday, November 8
Morning Session

MICHIGAN CHIROPRACTIC COUNCIL, et al. v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICE, et al. (case nos. 126530, 126531)
Attorney for petitioners Michigan Chiropractic Council and Michigan Chiropractic Society: Kevin J. Moody/(517) 487-2070
Attorney for intervenors respondents Farmers Insurance Exchange and Mid-Century Insurance Company: Joseph A. Kuiper/(616) 752-2000
Attorney for amicus curiae Coalition Protecting Auto No-Fault: Steven A. Hicks/(517) 394-7500
Attorney for amicus curiae Insurance Institute of Michigan: John A. Yeager/(517) 351-6200
Attorney for amicus curiae Michigan State Medical Society: Joanne Geha Swanson/(313) 961-0200
Attorney for amicus curiae PPOM, L.L.C.: William D. Adams/(248) 335-5000
Trial court: Ingham County Circuit Court
At issue: This case involves a managed care option that Farmers Insurance Exchange and Mid-Century Insurance Company offer their no-fault policyholders. Under the option, a policyholder must seek medical care from members of a broad PPO network and must pay extra for out-of-network care. In exchange, policyholders receive a 40 percent premium discount. Does this managed care option limit the policyholder's choice of medical care in a way that is inconsistent with the principles of the state's No-Fault Act? Is the Court of Appeals correct that the managed care option policy endorsement is potentially misleading and deceptive?
Background: The petitioners are two groups of chiropractors who practice in Michigan. Farmers Insurance Exchange and Mid-Century Insurance Company, the appellants, are insurance companies that sell no-fault automobile policies in Michigan. They offer their no-fault policy holders a managed care option that requires the policyholders to seek medical care from members of a PPO network and pay extra (a $500 deductible and the balance above network rates) for out-of-network care. In exchange, policyholders receive a 40 percent premium discount. The petitioners filed an administrative action to challenge the validity of the managed care option, asking the Commissioner of the Office of Financial and Insurance Service to find that the option violated Michigan's No-Fault Act. The Commissioner did not schedule a hearing, ruling that the petitioners failed to established that their claims had any merit. The petitioners appealed to the Ingham County Circuit Court, which ruled in their favor. The circuit court concluded that the managed care option violated the No-Fault Act by requiring the health care

providers to be part of the PPO network, and by forcing participating health care providers to accept a fee that is less than the customary and reasonable fee required by the Act. The Court of Appeals affirmed this ruling in a published decision. It agreed with the circuit court that the managed care option was not authorized by law, and stated that the adoption of such a program was a matter for the Legislature. The Court of Appeals also stated that policyholders who elected the managed care option were potentially misled or deceived about the way in which their election affected the overall cost of their medical care. The no-fault insurance companies appeal.

PEOPLE v DROHAN (case no. 127489)
Prosecuting attorney: Thomas R. Grden/(248) 858-0656
Attorney for defendant Joseph Eric Drohan: Michael J. McCarthy/(313) 535-1300
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Hideaki Sano/(734) 668-7606
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: Timothy A. Baughman/(313) 224-5792
Trial court: Oakland County Circuit Court
At issue: In *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant. In Michigan, a person convicted of a felony is not sentenced to a specific prison term. Rather, the trial court imposes a sentence that is a range of months or years, with a specific minimum and maximum term. The maximum term is generally fixed by statute. The minimum term, however, can be affected by the sentencing judge's determination of facts that were not proven beyond a reasonable doubt to the jury or admitted by the defendant. Does *Blakely* invalidate Michigan's sentencing system?
Background: Defendant Joseph Eric Drohan worked at Medicaid Services in Birmingham. He was charged with sexually assaulting a coworker, Rebecca Curry, multiple times over a period of weeks. Although Drohan testified that he and Curry had a consensual relationship, the jury disbelieved his testimony and convicted him of one count of third-degree criminal sexual conduct, and one count of fourth-degree criminal sexual conduct. Drohan received a prison sentence of 10 years, seven months to 30 years for the third-degree criminal sexual conduct conviction, and of one to four years for the fourth-degree criminal sexual conduct conviction. When determining what Drohan's minimum sentences would be, the sentencing judge found that Curry suffered a psychological injury and that Drohan's conduct was "predatory" in nature; these findings were not made by the jury, and they potentially increased Drohan's minimum sentences. Drohan received the maximum sentences required by the criminal sexual conduct statutes. Drohan complained on appeal that the manner in which the trial court calculated his sentence violated *Blakely*. The Court of Appeals rejected Drohan's argument and affirmed his sentences in a published opinion. The appellate court relied on the Supreme Court's statement in *People v Claypool*, 470 Mich 715, 730 n 14 (2004), that *Blakely* does not affect Michigan's sentencing system. But the Court of Appeals also asked the Supreme Court to clarify whether *Claypool*'s discussion of *Blakely* was binding on the lower courts. Drohan appeals.

HOERSTMAN GENERAL CONTRACTING, INC. v HAHN, et al. (case no. 126958)
Attorney for plaintiff Hoerstman General Contracting, Inc.: Christopher J. Lynch/(269) 683-6500
Attorney for defendants Juanita Rems Hahn and C. Ronald Hahn: Timothy W. Woods/(574) 233-1194
Trial court: Cass County Circuit Court
At issue: A construction contractor and the owners of the home under construction were in dispute about a construction project that exceeded the initial cost estimates. Did the contractor's cashing of a check from the homeowners with the words "final payment" constitute an accord and satisfaction, so that the contractor cannot seek to recover additional payment from the homeowners?
Background: This case concerns a construction contract between Hoerstman General Contracting and the defendant homeowners, Juanita Rems Hahn and C. Ronald Hahn. The contract involved remodeling Juanita Rems Hahn's lake residence in Edwardsburg, Michigan. Hoerstman bid the work at $96,100. After a variety of mishaps and changes to the contract, the final cost turned out to be over $157,000. In an attempt to collect the amount it believed it was owed, Hoerstman placed a construction lien on the property and filed a lawsuit, in which Hoerstman alleged that the Hahns breached the parties' contract. In March 2000, at the height of this dispute, the Hahns sent a check to Hoerstman marked "final payment." Accompanying the check was a letter stating that the check was for the amount that the Hahns believed to be owed to Hoerstman. The letter added: "If we send you a check for the $5,144.79 we will consider this account closed and will not expect discussion of the other items." Hoerstman's attorney crossed out the words "final payment" on the check and deposited it in the contractor's account. The Hahns claimed at trial that this constituted an accord and satisfaction, and that Hoerstman was not entitled to any additional payment. The trial court did not agree. It ruled in Hoerstman's favor, finding that the contractor was still owed more than $26,000. The Court of Appeals affirmed in an unpublished opinion. It held that there was no accord and satisfaction because merely writing the words "final payment" on a check was not sufficient to inform Hoerstman that its acceptance of the check discharged the whole claim. The Hahns appeal.

Afternoon Session

ZSIGO v HURLEY MEDICAL CENTER (case no. 126984)
Attorney for plaintiff Marian T. Zsigo: Glenn N. Lenhoff/(810) 235-5660
Attorney for defendant Hurley Medical Center: Robert P. Roth/(248) 647-4242
Trial court: Genesee County Circuit Court
At issue: An employer is generally not liable for the wrongful actions of employees who acted outside the scope of their employment. Should the Supreme Court recognize the exception to that rule that is set forth in 1 Restatement Agency, 2d, § 219(2)(d), which would allow a suit against the employer if the employee was aided in accomplishing the tort by the agency relationship?
Background: A jury awarded plaintiff Marian T. Zsigo, a patient in Hurley Medical Center's emergency room, $1,250,000 in damages stemming from a sexual assault by a Hurley Medical Center nursing assistant. The assault occurred while Zsigo was having a manic-depressive episode, for which she had been admitted to emergency and placed in restraints. Zsigo sued only Hurley Medical Center, alleging that it was liable for the actions of its nursing assistant. Hurley

Medical Center argued that it was not responsible for the wrongful actions of an employee who was acting outside the scope of his employment. But the trial court denied the hospital's motion for summary disposition, finding that a jury might reasonably conclude that the medical assistant's relationship with the hospital helped him accomplish the sexual assault. Hurley Medical Center appealed the jury's verdict to the Court of Appeals. The appellate court reversed in an unpublished opinion, agreeing with Hurley Medical Center that an employer is not liable for the torts of its employees who are acting outside the scope of their employment. Zsigo appeals.

PEOPLE v HOULIHAN (case no. 128340)
Prosecuting attorney: William A. Forsyth/(616) 632-6710
Attorney for defendant Kenneth Jay Houlihan: Anne M. Yantus/(313) 256-9833
Attorney for amicus curiae Criminal Defense Attorneys of Michigan: Richard B. Ginsberg/(734) 213-0918
Attorney for amicus curiae Prosecuting Attorneys Association: Timothy A. Baughman/(313) 224-5792
Attorney for amicus curiae Attorney General: Eric Restuccia/(517) 373-4875
Trial court: Kent County Circuit Court
At issue: In *Halbert v Michigan*, 545 US __; 162 L Ed 2d 552; 125 S Ct 2582 (2005), the United States Supreme Court held that the due process and equal protection clauses require the appointment of counsel for defendants, convicted by way of a plea, who seek access to first-tier review in the Court of Appeals. In this case, the defendant appeals the trial court's denial of his motion for relief from judgment. The defendant argues that he is entitled to relief from judgment because the Kent County Circuit Court denied his timely request for appointment of appellate counsel to assist him in his appeal of right. Does *Halbert* entitle the defendant to relief from judgment and the appointment of counsel?
Background: In 2001, defendant Kenneth Jay Houlihan pled guilty to first-degree criminal sexual conduct offense and child sexually abusive activity. He was sentenced to 20 to 40 years for the criminal sexual conduct offense and 13 years, four months to 20 years for the child sexually abusive activity. Houlihan requested but was denied counsel, pursuant to MCR 770.3a. He filed an *in pro per* application for leave to appeal in the Court of Appeals, in which he argued that he was entitled to the appointment of appellate counsel. The Court of Appeals denied leave to appeal. Houlihan then sought leave to appeal in the Supreme Court, which also denied leave to appeal. After he exhausted his ability to pursue a direct appeal of his convictions, Houlihan returned to the trial court and filed a motion for relief from judgment, once again asking that his convictions be set aside. In this motion, Houlihan again requested the appointment of appellate counsel. The motion for relief from judgment was denied. Houlihan sought review in the Court of Appeals, but that court denied defendant's delayed application for leave to appeal for "lack of merit." Houlihan appeals.

MICK v LAKE ORION COMMUNITY SCHOOLS, et al. (case nos. 126547, 126548)
Attorney for plaintiff David M. Mick: Jeffrey S. Burg/(248) 723-8692
Attorney for defendants Lake Orion Community Schools, Robert Bass, et al.: Mary Massaron Ross/(313) 983-4801
Trial court: Oakland County Circuit Court
At issue: The plaintiff teacher claimed that he was the victim of gender discrimination and

retaliation at the hands of school administrators who promoted less-qualified female applicants into administrative positions in the elementary schools. Did the plaintiff present sufficient evidence that he was the victim of gender discrimination to avoid summary disposition? Did the plaintiff experience an adverse employment action, so as to permit his retaliation claim to go forward?

Background: Except for a two-year period, plaintiff David M. Mick has been a teacher with defendant Lake Orion Community Schools since 1974. Mick alleges that he became the victim of gender discrimination during the 1991 to 1999 tenure of Superintendent Robert Bass. Mick claims that Bass was predisposed to discriminate against men in filling elementary level administrative positions, and that Bass placed women less qualified than Mick in five of six positions which Mick applied for during this period. Mick filed a gender discrimination charge with the Equal Employment Opportunity Commission (EEOC), which determined that there was reasonable cause to believe that he had been the victim of discrimination. Mick claims that, after the EEOC determination, administrators in the school district retaliated against him by removing him from his school committee positions, denying him other administrative posts, and disciplining him for the first time in his entire career. Mick brought this Civil Rights Act complaint against the school district and several administrators, alleging that he was the victim of gender discrimination and retaliation. The trial court dismissed Mick's claims in their entirety, but the Court of Appeals reversed several of the trial court's rulings in an unpublished split decision. The court majority agreed that many of Mick's complaints were not actionable, but it ruled that Mick could proceed on two specific claims: that he was denied an elementary school principal position because of gender discrimination, and that later threats of discipline constituted illegal retaliation for Mick's EEOC charge. The dissenting Court of Appeals judge concluded that none of Mick's claims was sufficient to go to a jury. The defendants appeal the reinstatement of two of Mick's allegations of discrimination.

Wednesday, November 9
Morning Session

WEXFORD MEDICAL GROUP v CITY OF CADILLAC (case no. 127152)
Attorney for petitioner Wexford Medical Group: John D. Pirich/(517) 377-0712
Attorney for respondent City of Cadillac: Roger L. Wotila/(231) 775-1391
Attorney for amicus curiae McLaren Health Care Corporation: Carol L. Fossee/(248) 642-7733
Attorney for amicus curiae Michigan Association of Homes and Services for the Aging: Christine Mason Soneral/(313) 568-6849
Attorney for amicus curiae Michigan Health and Hospital Association: Michael J. Philbrick/(248) 740-7505
Attorneys for amicus curiae Michigan Municipal League and Michigan Townships Association: Richard D. Reed, Matthew L. Lager/(269) 388-7600
Attorney for amicus curiae Michigan Rural Health Clinics Organization: E. William Shipman/(313) 983-7461
Tribunal: Michigan Tax Tribunal
At issue: Wexford Medical Group, a nonprofit medical clinic, was denied tax-exempt status under MCL 211.7o (charitable institution exemption) and MCL 211.7r (public health

exemption). Is Wexford ineligible for tax-exempt status because1) its operation is that of a typical family medical practice, 2) it receives some reimbursement for almost all services rendered, and 3) it does not perform an adequate number of charitable services?
Background: Plaintiff Wexford Medical Group is a nonprofit corporation providing health care to Wexford County residents. Wexford is an exempt organization under the Internal Revenue Code, section 501(c)(3); Wexford's mission includes providing access to healthcare services in underserved areas of Northern Michigan. This dispute concerns Wexford's liability to the City of Cadillac for ad valorem taxes on its personal and real property. Wexford claimed that all of its personal property and 87 percent of its real property is exempt from ad valorem taxation under the charitable and public health exemptions of the General Property Tax Act. The City of Cadillac disagreed, and assessed taxes on Wexford's personal and real property. Wexford filed a petition in the Michigan Tax Tribunal, seeking to overturn the assessment. The Tribunal ruled in the City of Cadillac's favor and upheld the assessment. The Tribunal concluded that Wexford failed to show that it qualified for an exemption under MCL 211.7o (charitable institution exemption) or MCL 211.7r (public health exemption). The Tribunal noted that Wexford has an annual budget of approximately $10 million and has about 44,000 patient visits per year. It also noted that Wexford collected significant fees from its self-pay patients, Medicare patients, Medicaid patients, and Blue Cross patients. The Tribunal acknowledged that Wexford operates at a loss and that its parent corporations subsidized the medical care provided at its facilities. But the Tribunal concluded that Wexford's primary purpose in its operation is that of a typical family medical practice, and that it provided only limited charitable services, valued at about $2,400, to fewer than a dozen patients in each taxable year. Accordingly, Wexford was not entitled to either the charitable tax exemption or the public health tax exemption, the Tribunal held. The Court of Appeals affirmed in an unpublished per curiam opinion. Wexford appeals.

WILSON, et al. v ALPENA COUNTY ROAD COMMISSION (case no. 126951)
Attorney for plaintiffs Diane Wilson and Paul Wilson: Aaron J. Gauthier/(231) 627-7151
Attorney for defendant Alpena County Road Commission: Jon D. Vander Ploeg/(616) 774-8000
Trial court: Alpena County Circuit Court
At issue: The Court of Appeals held that, once a road reaches a certain point of disrepair, the only reasonable repair a governing authority could do was to rip up and rebuild the road. Is this an accurate statement of the county road commission's obligation to maintain a road in a condition of "reasonable repair" so that it is reasonably safe and fit for travel?
Background: Plaintiff Diane Wilson alleges that she was thrown from her bicycle while riding on an Alpena County road. Wilson maintains that she was injured by one of the many potholes on the road she was traveling, although she admits that she never saw the pothole and cannot remember exactly where the accident occurred. Wilson and her husband Paul sued defendant Alpena County Road Commission. To sue a governmental entity, the Wilsons must establish an exception to governmental immunity. MCL 691.1402 provides one exception: a plaintiff may sue after being injured on a public road if the responsible governmental agency failed to maintain the road in a condition of reasonable repair, so that it was reasonably safe and fit for travel. Here, the Wilsons claim that the road commission failed to reasonably maintain the road; they argue that the commission's statutory duty included an obligation to reseal the road. The road commission asked the trial court to dismiss the lawsuit, arguing that Wilson could not prove that the commission knew of the pothole that she claims caused her injury, and that Wilson could not

show that her injury was caused by the road condition because she had no memory of why she fell. The road commission also asserted that resealing the road was outside its statutory duty to maintain and repair the road, because the road had so deteriorated that it was beyond the point of salvaging. The trial court agreed with the road commission and dismissed the lawsuit. The Court of Appeals reversed in a published opinion. It specifically rejected the road commission's claim that it had no obligation to repair the road, stating that a defendant cannot escape liability "simply by allowing a road to deteriorate to a point where the only economically feasible 'maintenance' is to reconstruct the entire roadway." It also ruled that Wilson's theory of the accident was sufficient to permit a jury to find in her favor, and that facts supported the plaintiffs' theory that the road commission knew of the condition of the road. The road commission appeals.

WOLD ARCHITECTS AND ENGINEERS, INC. v THOMAS STRAT, et al. (case no. 126917)

Attorney for plaintiff Wold Architects and Engineers, Inc.: Bruce L. Sendek/(313) 225-7000
Attorney for defendants Thomas Strat and Strat & Associates, Inc.: Frederick F. Butters/(248) 647-9653
Trial court: Oakland County Circuit Court
At issue: Does common law arbitration still exist in Michigan, or has it been preempted by Michigan's arbitration statute, MCL 600.5001? Was the arbitration agreement in this case for common law arbitration or did the parties agree to statutory arbitration? Should common law arbitration agreements be irrevocable?
Background: The plaintiff, Wold Architects and Engineers, Inc., is an architectural engineering firm headquartered in St. Paul, Minnesota. In June 2000, Wold entered into an agreement to purchase the assets of Strat and Associates, Inc., an architectural firm wholly owned by the defendant, Thomas Strat. As part of this purchase agreement, Strat entered into a five-year employment agreement with Wold. The employment agreement included an arbitration provision; the asset purchase agreement did not. When a dispute later arose between the parties, Strat invoked the arbitration provision in the employment agreement. Over the next few months, both parties participated in the arbitration process, selecting an arbitrator, exchanging documents, and agreeing on a hearing date. But before the arbitration hearing took place, Wold stated that it was revoking the agreement to arbitrate. It pointed out that the asset purchase agreement did not contain an arbitration provision and argued that there were more issues at stake in the arbitration than those governed by the employment agreement. Wold sued, asking the trial court to rule that the pending arbitration was invalid, and that the agreement to arbitrate in the employment contract could be revoked by either party. The trial court rejected Wold's arguments and ordered the parties to continue with the arbitration. They did, and the arbitrator ruled in Strat's favor, awarding $104,559.27 for past due compensation, attorney fees, and interest. At this point, Wold returned to the trial court, requesting that it vacate the arbitration award. Consistent with its earlier decision, the trial court refused and dismissed Wold's lawsuit. Wold appealed. The Court of Appeals reversed in an unpublished decision, finding that the trial court erred in enforcing the common-law arbitration agreement when Wold revoked the agreement before the arbitration award was issued. Strat appeals, arguing that the parties' agreement was a statutory arbitration agreement, not a common-law agreement, and could not be revoked by Wold.

Afternoon Session

PEOPLE v WESTCARR (case no. 126477)
Prosecuting attorney: Valerie M. Steer/(313) 224-0205
Attorney for defendant Anthony Westcarr: Robin M. Lerg/(248) 649-4777
Trial court: Wayne County Circuit Court
At issue: The trial court allowed the prosecutor to add a medical witness on the first day of trial, and then denied defendant's request for a continuance in order to retain a medical expert of his own. Did the trial court abuse its discretion? Did defense counsel provide constitutionally ineffective representation? Did the trial court impose an unlawful minimum sentence?
Background: Anthony Westcarr, the defendant in this case, was charged with four counts of first-degree criminal sexual conduct for engaging in sexual penetration with his stepdaughter when she was five and six years old. Westcarr denied the allegations, and his attorney argued that the child's mother encouraged her to make false allegations of sexual abuse in order to punish Westcarr for their marital problems. The jury found Westcarr guilty of three counts of first-degree criminal sexual conduct; the trial court sentenced him to three concurrent terms of 15 to 30 years. The Court of Appeals affirmed in an unpublished per curiam opinion. Westcarr appeals, alleging that numerous errors occurred at trial. One of his arguments concerns the prosecutor's revelation on the first day of trial that he planned to call a new expert medical witness. The parties knew all along that one physician who examined Westcarr's stepdaughter, Dr. Sudershan Grover, found a yellow discharge, bruises, and abrasions on the child's external genitalia, injuries that might have been, but were not necessarily, caused by sexual abuse. Notably, Dr. Grover found that the child's hymen was intact. On the first day of trial, the prosecutor provided defense counsel with medical records showing that a second physician, Dr. Leland Babitch, found that the hymen was not intact. The prosecutor expressed his intent to call Dr. Babitch to testify about this finding. Defense counsel objected to the new witness. Defense said that he had decided not to retain an independent medical expert because Dr. Grover's opinion -- that the hymen was intact -- would give rise to reasonable doubt that any sexual abuse had occurred. Defense counsel asked that the court not allow Dr. Babitch to testify; in the alternative, he asked that the trial court grant a continuance of the trial and allow him additional time to find an expert. The trial court refused this request, and the Court of Appeals later affirmed its ruling in an unpublished opinion. The appellate court found that Westcarr was not prejudiced by the prosecutor's last-minute decision to call Dr. Babitch to testify at trial. In his appeal, Westcarr also argues that his trial counsel provided ineffective representation, that the trial court erred in allowing a witness to offer rebuttal testimony, that he was denied discovery, and that his minimum sentence was not calculated properly.

KORRI v NORWAY VULCAN AREA SCHOOLS (case no. 125691)
Attorney for petitioner Susan Korri: William F. Young/(517) 349-7744
Attorney for respondent Norway Vulcan Area Schools: Robert G. Huber/(517) 374-8830
Tribunal: State Teacher Tenure Commission
At issue: The respondent school district was required to give probationary teachers, such as the petitioner, an "annual year-end performance evaluation." MCL 38.83a(1). In this case, the petitioner was notified by letter in March 2001 of her termination. Did the respondent fail to provide an annual year-end performance evaluation within the meaning of MCL 38.83a(1)? Did the fact that the petitioner was notified that her employment was terminated, pursuant to MCL

38.83, affect the respondent's obligation to issue a year-end evaluation?
Background: Petitioner Susan Korri was a probationary teacher employed by respondent Norway Vulcan Area Schools from July 1, 1999 through June 30, 2001. Korri was assigned to teach physical education for students in kindergarten through twelfth grade. Her supervisor, Principal Bertha Hommer, met with her several times during her employment and expressed concern about her performance. Hommer had asked Korri to implement a specific curriculum, but Korri did not. Hommer noted that Korri's actions had strained their professional relationship. While concluding that Korri understood teaching techniques, Hommer expressed the view that Korri demonstrated a lack of respect for and a failure to maintain a positive relationship with her supervisor. Following a January 2001 evaluation, Hommer contacted the School District's Superintendent and recommended that Korri not be retained as a teacher. On March 13, 2001, Korri was informed by letter that her employment was being terminated due to unsatisfactory performance. Korri appealed her termination, but an administrative law judge upheld the Norway Vulcan Area Schools' decision to terminate Korri's employment. In doing so, the judge rejected Korri's argument that the school system failed to conduct a year-end evaluation and, as a result, failed to satisfy the procedural requirements for terminating a probationary teacher's employment. But the State Tenure Commission found Korri's argument persuasive, and it reversed the administrative law judge's ruling. The Court of Appeals affirmed in an unpublished opinion, agreeing that Korri's employment was not properly terminated. Norway Vulcan Area Schools appeals.

PEOPLE v WILLIAMS (case no. 126956)
Prosecuting attorney: Jeffrey Caminsky/(313) 224-5846
Attorney for defendant Cleveland Wayne Williams: Jacqueline J. McCann/(313) 256-9833
Trial court: Wayne County Circuit Court
At issue: The defendant, who was on parole, was arrested for armed robbery. He was returned to prison, where he stayed for a year until the preliminary examination was held. He now claims that the prosecution is barred by the 180-day rule, which requires a prosecutor to make a good faith effort to bring a criminal charge to trial within 180 days of the time the prosecutor learns that the charged person is incarcerated or awaiting incarceration, or within 180 days of the time the Department of Corrections knows that a criminal charge is pending against a person who is incarcerated or awaiting incarceration. The defendant also claims that the prosecution is barred by speedy trial principles. Should the Supreme Court review the rule established in *People v Chavies*, 234 Mich App 274 (2000), which held that the 180-day rule does not apply where sentences would be consecutive (which can occur when a person, like this defendant, is arrested for committing a new crime while on parole)? Is defendant entitled to dismissal on the traditional speedy trial principles of *Barker v Wingo*, 407 US 514 (1972), and *People v Grimmett*, 388 Mich 590 (1972)?
Background: The prosecutor's evidence suggested that defendant Cleveland Wayne Williams threatened his young son's mother with a knife and took money from her purse. Williams was charged with armed robbery. At the time of his arrest, Williams was on parole for a 1998 conviction. Following his arrest, Williams was returned to the Department of Corrections on May 23, 2000. Nothing happened for the next year, until the preliminary examination was held on June 28, 2001, and Williams was bound over on the armed robbery charge. He was arraigned in circuit court. After two scheduling conferences, the case was set for trial on January 9, 2002. When the parties appeared for trial, defense counsel moved to dismiss based on the 180-day rule,

MCL 780.131 and MCR 6.004(D); he claimed that Williams had been denied his right to a speedy trial. The trial judge granted the motion to dismiss. The prosecutor appealed, and the Court of Appeals remanded for reconsideration. Among other things, the Court of Appeals directed the trial court to address *People v Chavies*, 234 Mich 274 (2000), in which the Michigan Supreme Court held that the 180-day rule does not apply to a situation in which the incarcerated defendant would face consecutive sentences. On reconsideration, the trial judge ruled that, under *Chavies*, the 180-day rule did not apply, because Williams would face consecutive sentences if convicted of armed robbery. The judge also rejected Williams' claim that he had been denied a speedy trial, finding that Williams had not insisted on a speedy trial and was unable to show prejudice. When the Court of Appeals received the trial court's findings, it dismissed the appeal and remanded the case to circuit court for trial. Williams appeals.

Thursday, November 10
Morning Session Only

RADELJAK v DAIMLERCHRYSLER CORPORATION (case no. 127679)
Attorney for plaintiff Josip Radeljak, Individually and as Personal Representative of the Estate of Ena Begovic, Deceased, and as Next Friend of Lana Radeljak, Leo Radeljak and Tereza Begovic: James N. McNally/(248) 355-0300
Attorney for defendant DaimlerChrysler Corporation: Raymond M. Kethledge/(248) 822-7800
Attorney for amicus curiae Michigan Defense Trial Counsel: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Manufacturers Association: Frederick R. Damm/(313) 965-8300
Trial court: Wayne County Circuit Court
At issue: Croatian citizens who bought a Jeep in Italy were injured in an accident in Croatia. In a Wayne County suit, these citizens alleged that the Jeep was defectively designed in Michigan. The defendant auto manufacturer sought dismissal on the basis of forum non conveniens. Did the trial court abuse its discretion in granting the motion?
Background: The plaintiffs are Croatian citizens who were injured in an accident involving a 1993 Jeep Grand Cherokee. The Cherokee was designed and manufactured by defendant DaimlerChrysler in Michigan and sold in Italy. The plaintiffs were in the Cherokee on August 15, 2000, on the island of Brac, Croatia; the vehicle went from park to reverse, allegedly without any occupant input, and rolled off a roadway into a ravine. Ena Begovic was killed in the accident and the other plaintiffs were injured. The plaintiffs filed suit against DaimlerChrysler in Wayne County Circuit Court, alleging that the Jeep was defectively designed. DaimlerChrysler moved for dismissal of the plaintiffs' action on the basis of forum non conveniens, arguing that the lawsuit should not be allowed to continue in the Wayne County court. The trial court agreed with DaimlerChrysler that Croatia was a more appropriate forum than Michigan, and the court granted the motion. The plaintiffs appealed to the Court of Appeals, arguing that the trial court abused its discretion by concluding that this product liability litigation "is among the exceptional cases in which a weighing of all the relevant factors decisively establishes that there is another available forum which will better serve the convenience of the parties and the ends of justice." The plaintiffs accused the trial court of simply shifting the burden of inconvenience to the opposite party. In an unpublished opinion, the Court of Appeals reversed the decision of the trial

court, relying on *Cray v General Motors Corp,* 389 Mich 382 (1973). The appellate court determined that Croatia was not a more appropriate forum than Michigan, and ruled that the trial court should not have resisted jurisdiction. DaimlerChrysler appeals.

HERALD COMPANY, INC. v EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS (case no. 128263)
Attorney for plaintiff Herald Company, Inc., d/b/a Booth Newspapers, Inc. and d/b/a Ann Arbor News: Jonathan D. Rowe/(734) 662-9252
Attorney for defendant Eastern Michigan University Board of Regents: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Detroit Free Press, Inc.: Herschel P. Fink/(313) 465-7400
Attorney for amicus curiae Michigan Association of Broadcasters and Michigan Press Association: Elise N. Reed/(313) 961-1900
Attorney for amicus curiae Michigan Municipal League Legal Defense Fund: Don M. Schmidt/(269) 381-7030
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
Attorney for amicus curiae Regents of the University of Michigan, the Board of Trustees of Western Michigan University, Central Michigan University Board of Trustees, Saginaw Valley State University, Board of Control of Michigan Technological University, the Board of Trustees of Oakland University, the Board of Control of Northern Michigan University, and the Board of Trustees of Michigan State University: Debra A. Kowich/(734) 764-0304
Trial court: Washtenaw County Circuit Court
At issue: Does a letter from a university vice president to a university regent, concerning a residence constructed for a university president, come under the "frank communications" exemption of the Freedom of Information Act, MCL 15.243(13)(1)(m)? Did the Court of Appeals correctly review the circuit judge's decision finding the letter exempt, in light of *Federated Publications, Inc v Lansing*, 467 Mich 98 (2002)?
Background: When Eastern Michigan University (EMU) President Samuel Kirkpatrick arrived on campus, the university began a project to construct a new president's residence. Public criticism of the project's cost resulted in a state audit, and Kirkpatrick eventually resigned. During the time of the controversy, an EMU Regent asked James Doyle, EMU Vice President for Business and Finance, to write a letter about Kirkpatrick's involvement in the construction project. Doyle wrote a letter and then retired. Herald Company, Inc., doing business as Booth Newspapers, Inc. and The Ann Arbor News, requested a copy of Doyle's letter under the Freedom of Information Act (FOIA). EMU declined to produce the letter, citing MCL 15.243(1)(m). That exemption allows a public body to exempt from disclosure "[c]ommunications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action." The exemption does not apply unless the public body shows that the public interest in encouraging "frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure . . . ." Herald Company sued, arguing that the letter did not fall under the "frank communication" exception. The trial judge reviewed the letter and ruled in EMU's favor. The judge noted that the letter contained some "factual material" that was not severable from the rest of the letter, which contained a summary of events from Doyle's perspective. He also found that the Doyle letter

was preliminary to a final determination of policy or action, and that the public interest in encouraging "frank communications" outweighed the public interest in disclosure. The Court of Appeals affirmed in a split published opinion. The majority relied on *Federated Publications, Inc v Lansing*, 467 Mich 98, 109 (2002), for the proposition that an appellate court should defer to a trial court's balancing of the competing public interests under the FOIA. The Court of Appeals majority concluded that the trial court did not clearly err in this case. The dissenting judge disagreed with this standard of review, and argued that the majority ignored the statement of public policy in the FOIA: that "[t]he people shall be informed so that they may fully participate in the democratic process." MCL 15.231(2). Herald Company appeals.

DEYO v DEYO (case no. 126795)
Attorney for plaintiff Kenneth R. Deyo: Kevin S. Gentry/(734) 449-9999
Attorney for defendant Vicki E. Deyo: Charles W. Widmaier/(810) 229-9340
Trial court: Livingston County Circuit Court
At issue: In this divorce case, did the Court of Appeals err when it affirmed the trial court's ruling that a husband's individual inheritance from his father should be included in the marital estate? Was the trial court's determination that the wife contributed to the care of her husband's father a finding that she "contributed to the acquisition, improvement, or accumulation of the property," consistent with MCL 552.401?
Background: The parties were married for 25 years. Plaintiff Kenneth Deyo was employed throughout most of the marriage as a grave-digger at Holy Sepulchre Cemetery in Howell, and defendant Vicki Deyo was a homemaker who raised the couple's children. They lived frugally. When Vicki Deyo received a $100,000 inheritance early in the marriage, she used it for household expenses. In 1994, Kenneth Deyo's father, Orville Quinney, fell ill and the Deyos began helping out with his care. He moved in with them in 1996, when Kenneth Deyo quit his job and began caring for his father full time. In 1997, Quinney died, and Kenneth Deyo, alone, received an inheritance valued at $2,339,133. The inherited estate included properties in South Lyon, Howell, Warren, Roseville, and Milford; securities in the amount of about $527,000; and a $39,502 bank account. In 2001, at the time of the divorce, Kenneth Deyo argued that none of this inheritance should be included in the marital estate, which, without the inheritance, consisted of about $713,634. The trial court disagreed, and included all of the inherited property in the marital estate. The judge determined that Vicki Deyo "did contribute to the inherited estate" through her care for her husband's father and her continuation in the marriage for so many years; the judge emphasized that she had been "a good and faithful wife for 25 years." The judge awarded 64 percent of the total assets of the parties to Kenneth Deyo and 36 percent to Vicki Deyo, who was also awarded $200 per week in alimony. Kenneth Deyo appealed, and, in a split, unpublished decision, the Court of Appeals affirmed the judgment of divorce, finding no error in the trial court's property distribution and award of spousal support to Vicki Deyo. The dissenting judge would not have included the inherited assets in the marital estate. Kenneth Deyo appeals.

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